STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY COLEMAN,

Defendant-Appellant.

UNPUBLISHED
August 19, 1997

No. 176927
Oakland Circuit Court
LC No. 92-120693-FC

Before: Wahls, P.J., and Taylor and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of conspiracy to possess with intent to deliver 650 grams or more of heroin, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) and MCL 750.157a; MSA 28.354(1), and was sentenced to life imprisonment without parole. He appeals as of right. We affirm.

Defendant first argues that his criminal conviction violated his right to be free from double jeopardy because it followed a civil forfeiture action. We disagree. Being a question of law, this issue is reviewed de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996).

To establish a violation of double jeopardy when a criminal prosecution follows an in rem civil forfeiture proceeding under MCL 333.7521 *et seq.*; MSA 14.15(7521) *et seq.*, a defendant has the burden to present "the 'clearest proof' indicating that the forfeiture is 'so punitive in purpose or effect' that it is equivalent to a criminal proceeding." *People v Acoff*, 220 Mich App 396, 397-398; 559 NW2d 103 (1996), quoting *United States v Ursery*, 518 US ___; 116 S Ct 2135; 135 L Ed 2d 549, 569 n 3 (1996). In this case, $110,010 was forfeited. Defendant has failed to present the clearest proof that the forfeiture of $110,010 was so punitive in purpose or effect as to render the forfeiture criminal. His criminal conviction following the civil forfeiture action did not violate the double jeopardy protections. *Acoff*, *supra*.

Defendant next argues that his state prosecution was the result of prosecutorial vindictiveness. We disagree. By failing to file a second motion to remand upon the Supreme Court's decision in *People v Ryan*, 451 Mich 30; 545 NW2d 612 (1996), pursuant to our order,

People v Coleman, unpublished order of the Court of Appeals, issued May 9, 1995 (Docket No. 176927), defendant has waived review of this issue. In any event, defendant has failed to establish a prima facie case of prosecutorial vindictiveness.

A defendant bears the burden to affirmatively establish actual vindictiveness, which "will be found only where objective evidence of an 'expressed hostility or threat' suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right." *Ryan*, *supra* at 36. A threat to refer a case for state prosecution falls short of objective evidence of hostile motive where it is not made by a person with authority to prohibit the state prosecutor from exercising the legitimate power to prosecute violations of Michigan law. *Id.* at 37. The state holds authority independent of that of the federal government to prosecute crimes that occur within its borders.

The factual assertions made by defendant create no association between the assertion of his right to counsel and any adverse action by the authorities. His claim of being told that he might be prosecuted in federal court if he cooperated but that, upon his refusal to cooperate, he was prosecuted by the state fails to establish prosecutorial vindictiveness for two reasons. First, the state had independent authority to prosecute defendant. Second, the statement was made by police officers, not the prosecutor, upon whom the decision to prosecute rests. Thus, defendant has failed to allege facts to establish a prima facie case of prosecutorial vindictiveness.

Defendant next argues that he was denied a fair trial because law enforcement officials improperly manufactured venue in the case. We disagree. Although this issue is raised for the first time on appeal, this Court will review the issue because it involves a constitutional question. *People v Zinn*, 217 Mich App 340, 344; 551 NW2d 704 (1996). This argument is based on defendant's claim that he repeatedly stated to the confidential informant that he did not want to go to Oakland County to make the drug transaction. The record reveals two statements by defendant during the negotiations indicating that he did not want to "do the deal" in Oakland County. However, defendant did in fact go to Oakland County and enter into an agreement to purchase the heroin. Although defendant cites cases addressing proof of proper venue, it is clear from the facts that the prosecution proved that the proper venue was Oakland County. There is no support for the suggestion that law enforcement officials manufactured venue in order to prosecute defendant in a county with a smaller percentage of African-Americans than Wayne County.

Defendant further argues that he was denied a fair trial and equal protection because the jury panel was not representative of a fair cross-section of the community. A defendant challenging a jury array forfeits appellate review where, in addition to making the challenge after the jury has been impaneled and sworn, he fails to create a factual record to support his claim. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Although defendant raised his challenge to the jury array before the jury was sworn, he did not create a factual record regarding the composition of the petit jury. Therefore, this issue is not properly preserved. *Id*.

Moreover, defendant has failed to establish a prima facie case that the "fair cross-section requirement" was violated. A defendant is guaranteed the opportunity for a representative jury by the requirement that the prospective juror selection method not systematically exclude distinctive population

groups in the community so that it fails to constitute a fair cross-section of the community. *People v Hubbard (After Remand)*, 217 Mich App 459, 464-465; 552 NW2d 493 (1996), citing *Taylor v Lousiana*, 419 US 522, 526-531; 95 S Ct 692; 42 L Ed 2d 690 (1975). To establish a prima facie violation of the "fair cross-section requirement," a defendant must demonstrate

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*Id*. at 473, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant failed to demonstrate that African-Americans were underrepresented in the total jury pool from which the initial seventy to seventy-five prospective jurors were chosen. He also failed to establish that African-Americans constituted more than five percent (i.e., four of seventy-five) of Oakland County. Finally, defendant does not even allege that Oakland County employs a juror selection method that systematically excludes African-Americans. Defendant has not established a prima facie case that the "fair cross-section requirement" was violated.

Defendant also argues that he was denied the right to a fair trial by the admission of hearsay, irrelevant, and high prejudicial evidence. We disagree. The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

By failing to cite authority to support his argument that the informant's statement was improperly admitted under MRE 803(5), defendant has effectively waived this issue on appeal. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). Defendant's challenge to the court's questioning of witnesses fails because he has not demonstrated that the court's questions were improper. See *People v Davis*, 216 Mich App 47, 49; 549 NW2d 1 (1996).

Defendant has failed to provide authority that a witness may not examine two signatures and testify about whether they are similar; thus, the argument that this evidence was improperly admitted is waived. *Piotrowski*, *supra*. The court rules cited by defendant pertain to the authentication of signatures, which was not involved in the instant case. The trial court did not abuse it discretion in allowing the testimony.

Defendant failed to object to the confidential informant's testimony regarding statements made by the codefendant. He has therefore failed to preserve this argument for appeal. *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). He has similarly failed to preserve his challenge to the admission of the codefendant's statements on the basis that they were not in furtherance of the conspiracy.

Defendant asserts that the trial court erred in admitting evidence of other bad acts for purposes other than those provided in MRE 404(b). Other acts evidence is admissible providing

it is relevant and does not involve an inference regarding the defendant's character. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993). Thus, other acts evidence is admissible when (1) it is offered for a noncharacter purpose, MRE 404(b); (2) it is relevant to an issue of fact or consequence at issue at trial, MRE 402 and MRE 104(b); and (3) its probative value is not outweighed by the danger of unfair prejudice, MRE 403. *VanderVliet*, *supra* at 74-75. The challenged evidence was used by the prosecutor to demonstrate that defendant had a motive to find a more reliable source for cocaine and heroin. This satisfies the first of the *VanderVliet* factors. The evidence was relevant because it was responsive to defendant's claim that the confidential informant had an interest in manufacturing cases against drug dealers to receive preferential treatment. This satisfies the second factor. Finally, in light of defendant's argument that he was set up by the confidential informant, we find that the probative value of the evidence was not outweighed by the danger of unfair prejudice. Aside from the confidential informant's testimony, the challenged other acts evidence was the only support for the position that the codefendant contacted the confidential informant to initiate a drug trafficking relationship. Because the *VanderVliet* factors were satisfied and the trial court gave the jury a limiting instruction regarding its consideration of the other acts evidence, the trial court's decision to admit the evidence was not an abuse of discretion. *Bahoda, supra*.

Defendant also argues that the trial court erred in admitting irrelevant and prejudicial evidence that was seized under federal search warrants. Because this evidence supported the prosecution's theory on motive, it was relevant and was not unfairly prejudicial. The trial court did not abuse its discretion in admitting the evidence. *Bahoda, supra*.

Defendant further argues that the trial court erred in denying his motion to suppress the videotape. We disagree. Whether an informant's consent to videotaping a conversation with a defendant violates the protections against unreasonable searches and seizures presents a legal question that is reviewed de novo. *Medlyn, supra*. The trial court's decision on a motion for suppression of evidence is also reviewed de novo. *People v Goforth*, 222 Mich App 306, 310, n 4; ___ NW2d ___ (1997).

In *People v Collins*, 438 Mich 8; 457 NW2d 684 (1991), the Supreme Court ruled that participant monitoring without a warrant is permitted. Defendant argues that this ruling does not include videotaping. "Participant monitoring" was defined in *Collins* as "the electronic monitoring (whether or not recorded) by a law enforcement agent of a conversation where one of the parties to the conversation has previously consented to the activity." *Id.* at 11, n 1.

Defendant has failed to establish a distinction between the videotaping and audiotaping of conversations between an informant and a defendant. *Collins* does not limit its holding to audiotaping, but extends it to all participant electronic monitoring. We find no basis on which to distinguish the two forms of electronic monitoring.

Defendant next argues that the trial court erred in denying his motion to suppress evidence on the basis that the search warrants were constitutionally infirm. We disagree.

First, defendant asserts that the affidavits supporting the issuance of the warrants did not establish probable cause because the information was stale. When reviewing a search warrant and its underlying affidavit, this Court must read them in a common sense and realistic manner and give deference to the magistrate's determination of probable cause. *People v Sloan*, 450 Mich 160, 168; 538 NW2d 380 (1995). The deference to be given the magistrate's decision requires this Court to determine whether "a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding" by the magistrate that there is a "fair probability that contraband or evidence of a crime will be found in a particular place." *Id.*; *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992) (quoting *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 [1983]).

"Staleness" is an aspect of the inquiry into probable cause. *Russo, supra* at 605.

> Time as a factor in the determination of probable cause to search is weighed and balanced in light of other variables in the equation, such as whether the crime is a single instance or an ongoing pattern of protracted violations, whether the inherent nature of the scheme suggests that it is probably continuing, and the nature of the property sought, that is, whether it is likely to be promptly disposed of or retained by the person committing the offense. The matter must be determined by the circumstances of each case. [*Id.* at 605-606, (citations omitted).]

The facts set forth in the affidavit supporting the searches sets forth facts establishing an ongoing criminal enterprise, i.e., drug trafficking. Defendant argues that the information that an informant saw approximately $40,000 and two Uzi machine pistols in defendant's residence about two years before the affidavit was signed, and that the informant saw defendant counting approximately $200,000 at another residence five months before the affidavit was signed, was stale and could not support a finding of probable cause to search these residences. However, these facts suggest that defendant was involved in drug trafficking and that it was probably ongoing. Such a conclusion is supported by a reading of the affidavit in its entirety. The magistrate did not err in concluding that there was probable cause to search the residences.

Because defendant failed to raise the issue that the warrants were general warrants and prohibited by the Fourth Amendment before this appeal, it is unpreserved. However, this Court will address unpreserved constitutional issues. *Zinn, supra*. US Const, Am IV, prohibits general warrants. *People v Harajli*, 170 Mich App 794, 799; 428 NW2d 781 (1988). A warrant must contain a particular description of the things to be seized. *Id.* The items described in the warrant were those specific to drug trafficking. The items had been identified by the affiant as, on the basis of his experience and knowledge regarding drug trafficking, as items commonly utilized or possessed by drug traffickers. The warrants were sufficiently specific in authorizing the seizure of items connected to drug trafficking and were not improper general warrants.

Defendant next argues that the evidence was not sufficient to establish conspiracy to possess with intent to deliver 650 grams or more of heroin. We disagree. When reviewing a challenge based on insufficient evidence, this Court must consider the evidence in a light most favorable to the prosecution and determine whether a rational fact finder could have found that the prosecution proved the essential

elements of the offense beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 516 n 6; 489 NW2d 748, amended 441 Mich 1201 (1992).

A conspiracy is an agreement between one or more persons to commit an illegal act or to commit a legal act in an illegal manner. MCL 750.157a; MSA 28.354(1). Conspiracy is a specific intent crime, which requires an intent to combine with others and an intent to accomplish the illegal objective. *People v Cotton*, 191 Mich App 377, 392-393; 478 NW2d 681 (1991). The offense requires an unlawful agreement. Once the agreement is formed, the crime is complete. *People v Meredith (On Remand)*, 209 Mich App 403, 411; 531 NW2d 749 (1995). The agreement need not be established by direct proof or proof of a formal agreement. The circumstances, acts, and defendant's conduct may establish the unlawful agreement. *Cotton*, *supra* at 393.

The evidence indicates that defendant and his codefendant entered into an unlawful agreement to purchase heroin. In August 1992, the codefendant contacted an informant who then gave the codefendant prices for cocaine and heroin. The men set up a meeting, which included defendant, and defendant told the informant he was ready to purchase three kilograms of heroin. Defendant, the codefendant, and an unidentified third man went to a hotel as the informant instructed the codefendant. At the hotel, the undercover agent and defendant discussed the deal. The informant left with the three men. Undercover agents watched the informant, defendant, and the codefendant go to the codefendant's car. The hatchback was opened, defendant and the codefendant pulled a bag out of the car, and the codefendant handed it to the informant. The informant returned to the hotel with a bag containing $110,010.

Viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented to prove beyond a reasonable doubt the existence of a conspiracy between defendant and the codefendant.

Next, defendant argues that the verdict was against the great weight of the evidence. Because defendant did not move for directed verdict or new trial on the basis that the verdict was against the great weight of the evidence, this issue is not properly preserved. MCR 2.611(A)(1)(d); *People v Patterson*, 428 Mich 502, 514-515; 410 NW2d 733 (1987).

Defendant next argues that he was denied a fair trial because the jury saw him in handcuffs while it was deliberating. This argument is not supported by the record.

Although freedom from shackling or physical restraint is important to insure a fair trial, *Dixon*, *supra* at 404, restraint is permitted under extraordinary circumstances, such as "to prevent escape, injury to persons in the courtroom, or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

Our review of the record reveals that nothing in the exchange on which this argument is based indicates that any juror saw defendant in handcuffs. Rather, it is clear that the court withheld having defendant brought up to the courtroom until the jurors were secure in a location from which defendant would not be seen. There is no indication that defendant was handcuffed in the courtroom during trial.

It was while defendant was in transit to the courtroom following the lunch break that he was placed in handcuffs. Clearly, restraining defendant at this time was to prevent escape, which is a circumstance under which a defendant may be restrained.

Defendant also argues that the trial court erred in failing to require the prosecution to produce exculpatory and impeachment information. We find no error requiring reversal. This Court reviews a trial court's ruling regarding discovery in a criminal case for an abuse of discretion. *People v Lemcool*, 445 Mich 491, 498; 518 NW2d 437 (1994).

MCR 6.201(B)(1) requires the prosecution to provide the defendant, upon the defendant's request, "any exculpatory information or evidence known to the prosecuting attorney." A trial court should grant a motion for discovery of information that is "necessary to a fair trial and a proper preparation of a defense." *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). Provided the information will aid the defendant in the preparation of trial, inadmissible evidence is subject to discovery. *Id.* If the evidence is favorable to the defendant and material to guilt or innocence, the defendant has a due process right to obtain such evidence in the possession of the prosecution. *Id.*

Defendant moved for production of certain records and information regarding witnesses. The motion was granted. At trial, defendant argued that he had repeatedly asked for copies of letters written by federal agents on behalf of the informant's brother and any notes or conversations between the agents and the informant regarding the informant's brother. Defendant sought the prosecutor's file on the informant's brother to learn if anything the informant had done had been favorable to his brother and information that related to the informant's state of mind to testify truthfully.

The record reveals that the prosecution brought the files into court and arrangements were made for defense counsel to review the files. The issue was never again raised. The informant was questioned on his reasons for acting as an informant and whether he had realized any benefit from his involvement with the federal agencies. He was cross-examined regarding his motive for helping the authorities, and defense counsel raised questions for the jury to consider regarding the informant's credibility.

We reject defendant's argument because the record indicates that the requested information was received or made available. Further, defendant adequately probed the issue regarding the informant's motive for cooperation and his credibility; thus, it does not appear that the information was necessary for preparation of the defense. Moreover, defendant has not demonstrated that the evidence was material to his guilt or innocence. The informant's credibility was adequately challenged and called into question. Thus, defendant is not entitled to any relief regarding this claim.

Defendant further argues that he was denied effective assistance of counsel. We disagree. Because defendant did not move for a new trial or an evidentiary hearing on the basis of ineffective assistance of counsel, appellate review is limited to the existing record. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate not only that his counsel's performance fell below an objective standard of reasonableness, but also that the counsel's representative was so prejudicial as to deprive the defendant of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In proving a claim of ineffective assistance of counsel, a defendant must overcome the strong presumption that counsel's representation was sound trial strategy and that, but for counsel's error, it was reasonably probable that the outcome of the trial would have been different. *People v Stewart (On Remand)*, 219 Mich App 38, 41; 555 NW2d 715 (1996).

Defendant argues that he was denied effective assistance because his counsel had an irreconcilable conflict of interest. However, defendant indicated that he had "no problem at all" with his counsel continuing to represent him, even in light of the possible conflict of interest. Because he waived the conflict of interest issue and agreed to his counsel's continued representation, he may not now be permitted to claim error on this basis. *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1993).

Defendant's argument that he was denied effective assistance through his counsel's opening statement is without merit. In that statement, defense counsel asserted that a criminal tax matter against the informant had been terminated in exchange for the informant's cooperation with federal authorities. Defendant argues that this argument was improper because his counsel knew that he had no support for it. Contrary to defendant's assertion, it was not until after his counsel made his opening statement that the issue regarding the extent of cross-examination into the matter was raised. Thus, the claim of ineffective assistance of counsel on this basis is without merit.

Defendant also argues that his trial counsel should have had the Hilton videotape independently examined by an expert to review a nine-minute gap in it to determine whether it was altered. Defendant has not shown that he was prejudiced by this alleged ineffective assistance and has not shown that this resulted in the denial of a fair trial.

Defendant next argues that he was denied a fair trial by the trial court's failure to properly instruct the jury. We disagree. Jury instructions are reviewed in their entirety to determine whether there was error requiring reversal. *Davis*, *supra* at 54, quoting *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). They must not exclude material issues, defenses or theories, providing there is evidence to support them. As long as the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights, even imperfect instructions do not constitute error requiring reversal. *Id*.

Defendant requested a modification of CJI2d 5.7 for application to the informant. The trial court denied defendant's request. We find that the instructions given by the court fairly presented the issues with regard to the informant's status and insured that the jury would consider that status in determining how to accept his testimony. There was no error requiring reversal in the instructions given by the trial court.

Next, defendant argues that his mandatory life sentence constitutes cruel and/or unusual punishment under the state and federal constitutions. We disagree. In *People v Bullock*, 440 Mich 15, 37; 485 NW2d 866 (1992), the Supreme Court held that a nonparolable life sentence for possession of 650 grams or more of a mixture containing cocaine was so grossly disproportionate that it constituted cruel or unusual punishment under Const 1963, art 1 § 16. The Court noted

that the offense was one of mere possession with no intent to sell or distribute. *Id.* In *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993), the Court stated that the distinction between the offenses of possession and possession with intent to deliver "would obviously apply to the offense of conspiracy with intent to deliver." *Id.* There is nothing in these cases to suggest that the offense should be distinguished on the basis that it involves a conspiracy. Therefore, a sentence of life imprisonment without the possibility of parole for conspiracy to possess with intent to deliver 650 grams or more of a mixture containing a controlled substance is not cruel or unusual under the state or federal constitutions. See *Lopez, supra*; *Harmelin v Michigan*, 501 US ___; 111 S Ct 2680; 115 L Ed 2d 836 (1991).

Finally, defendant argues that his conspiracy sentence illegally bars him from parole consideration. We disagree. MCL 791.233b(1); MSA 28.2303(2) provides that conspiracy to commit a violation of MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) is a "major controlled substance offense" for purposes of MCL 791.234; MSA 28.2304. Further, MCL 791.234(6); MSA 28.2304(6) provides that prisoners sentenced to life imprisonment for a major controlled substance offense are not eligible for parole. The statute expressly includes conspiracy; therefore, defendant's life sentence with no possibility of parole is valid.

Affirmed.

/s/ Myron H. Wahls
/s/ Clifford W. Taylor
/s/ Joel P. Hoekstra